Ramachandran a/l Mayandy v Abdul Rahman bin Ambok Laongan & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 23-216-1992
ABDUL MALIK ISHAK J
1 MARCH 1996

Tort *— Vicarious liability — Accident causing personal injuries — Whether plaintiff was employee of defendants or of independent contractors — Whether there was relationship of master and servant between plaintiff and defendants— Appropriate test to determine existence of relationship*

Tort *— Negligence — Accident at work — Definition of negligence — Principle elements of tort of negligence — Whether defendants were liable in negligence for accident which caused injury to plaintiff — Whether plaintiff was solely responsible for his own misfortune*

The plaintiff claimed damages from the defendants for personal injuries and losses suffered by him arising from an accident which occurred at or near the second defendant's premises in Johor Bahru. As a result of the accident the plaintiff suffered a crush injury to his left leg with compound communited fracture of tibia and fibula, cut muscle, tendons, nerves and vessels which resulted in traumatic amputation of his left leg. The plaintiff testified that while he was under the employment of the second defendant as a lorry driver cum attendant and worked with one Hussain bin Mat Isa ('Hussain'), he was requested by an Indian man by the name of Kumar ('Kumar'), who was employed by the second defendant as an attendant in motor-lorry JBP 4502 ('the motor-lorry trailer') to open one of the doors or barriers of the motor-lorry trailer which, at the material time, was laden with iron pipes. The plaintiff acceded to the request. The plaintiff testified that whlist he was hitting the pin to the third door or barrier with a hammer to open the door or barrier, the pin broke and the door or barrier was flung open and two or three pieces of iron pipes rolled down and struck the plaintiff's left leg causing him to loss consciousness. The plaintiff further testified that the hammer was given to him by Kumar and that he agreed to help Kumar because Hussain had previously told him that if anyone from from the second defendant's company asked for any help he should be obliged to assist. The first defendant was the registered owner of the motor-lorry trailer which had been leased out to the second defendant almost immediately after the issuance of the permit by the licensing authorities. The first defendant did not employ any person in relation to the use of the motor-lorry trailer and he had no control or authority at all over the driver and/or attendant whoever they may be. He did not know the plaintiff or who the driver or attendant of the motor-lorry trailer were. The motor-lorry trailer was never used for the business of the first defendant. Supporting evidence was tendered by the second defendant by way of the monthly salary/ wages of the second defendant for 30 November 1996 to show that neither Kumar nor Hussain was on the payroll list of the second

defendant. There was evidence that for business efficacy and management and due to a lack of licensed motor-lorry trailers in its stable it was the practice of the second defendant to engage the services of other transporters with licensed motor-lorries complete with drivers and attendants. YS Repair and Transport Agency was one of the transporters which licensed lorries together with the drivers and attendants had been engaged by the second defendant. There was no evidence that the plaintiff was employed by the second defendant to work on the second's defendant premises pursuant to a contract between himself and the second defendant which fixed his remuneration. The plaintiff did not call Hussain or Kumar as his witness but it was his case that the accident was caused by the negligence of the servants or agents of the first and/or the second defendants. It was argued that the plaintiff took upon himself the risk of being injured and contributory negligence was pleaded by both the defendants. The scenario of what had happened on that fateful day revolved on the evidence of the plaintiff himself and he held onto the notion that his account of how the accident took place was more consistent with the negligence on the part of the defendants than with any other causes and he asked the court to find both the defendants negligent unless they could give reasonable explanations as to how the accident might have occured without negligence on their part.

Held, dismissing the plaintiff's claim against both the defendants:

(1) Both the defendants were not responsible for the employment of Kumar and Hussain and neither were they responsible for the organization for the removal of the iron pipes from the motor-lorry trailer on that fateful day. The first defendant merely lent his name to the second defendant so that the issuance of the permit by the licensing authorities would be approved. The first defendant had repelled the inference that Kumar was his servant or agent by giving evidence and asserting that he never knew Kumar and that his role was only minimal, viz lending his name for the purchase of the motor-lorry trailer and at no time did he use the motor-lorry trailer for his business. The motor-lorry trailer was stationary when the purported accident occurred. No liability could be attached to the first defendant as the registered owner of that motor-lorry trailer as there was no evidence that Kumar was the servant or agent of the first defendant, nor was there evidence that Kumar had acted on the instructions of the first defendant in the course of the first defendant's business (see pp 251H–252C); *Bank Voor Randall en Scheepvart NV v Slatford* [1953] 1 QB 248 and *Mat Jusoh bin Daud v Sykt Jasa Seberang Takir Sdn Bhd* [1982] 2 MLJ 71 followed.

(2) The mere fact that the motor-lorry trailer was used to transport goods commissioned by the second defendant, could not on its own give rise to a presumption that Kumar and Hussain were the servants and/or agents of the second defendant. There was

evidence that it was the practice of the second defendant to engage the services of other transporters with licensed motor-lorries complete with drivers and attendants. YS Repair and Transport Agency was one of such transporters. Under the services rendered by YS Repair and Transport Agency, the second defendant's role was only to give instructions with regard to the point of pick-up and the point of delivery; the second defendant was not responsible to dictate to the driver as to how to drive that motor-lorry or to select the desired route in order to arrive at the point of destination. These drivers and attendants were all under the payroll of YS Repair and Transport Agency. From the available evidence YS Repair and Transport Agency were independent contractors and even if YS Repair and Transport Agency were held to be negligent, the second defendant as temporary hirer could not be held vicariously liable for the accident (see pp 252G–253D).

(3) There was no evidence that the plaintiff was employed by the second defendant to work on the second defendant's premises pursuant to a contract between himself and the second defendant which fixed his remuneration. Consequently there was as between the plaintiff and the second defendant no relationship of master and servant, or employer and employee, not even a contract for services. The second defendant thus owed the plaintiff no duty of care at common law or even under statute and his claim for negligence must therefore fail. The second defendant was not in a position to give orders to the plaintiff as to how to do the job as there was absolutely no causal link between them at all (see p 253F–G).

(4) The foundation of the plaintiff's case was based entirely on Kumar and Hussain; without them the plaintiff's case weakened. Section 114(g) of the Evidence Act 1950 should be vigorously applied against the plaintiff. The failure of the plaintiff to put both Kumar and Hussain in the witness box raised a presumption against the plaintiff (see p 255H–I).

(5) There were blatant and material contradictions in the plaintiff's account of the accident which clearly put the plaintiff's case in jeopardy. Material discrepancies were apparent from the evidence of the plaintiff. The evidence could not support the plaintiff at all and his claim must be dismissed with cost (see p 259B).

(6) On the evidence available before the court the first defendant succeeded in showing that the plaintiff fully understood and appreciated the risk and danger of pulling out the pin and that the plaintiff had acted as a volunteer in the strict sense of the law (see p 262D).

(7) The plaintiff owed a duty of care to himself for his own safety. The plaintiff's evidence showed that he was solely negligent and was responsible for his own misfortune (see p 262G–H).

(8) The maxim res ipsa loquitor could not apply to the present case because the cause of the accident was known to the plaintiff. It

was because of the negligent act of the plaintiff in removing the pin that the iron pipes fell and hit him. The doctrine of res ipsa loquitur did not apply when the cause of the accident was known (see pp 263I–264B).

[Bahasa Malaysia summary

Plaintif telah menuntut ganti rugi daripada defendan-defendan untuk kecederaan diri dan kehilangan yang ditanggungnya akibat dari kemalangan yang berlaku pada atau berhampiran dengan premis defendan kedua di Johor Bahru. Akibat daripada kemalangan tersebut, plaintif mendapat kecederaan remuk pada kaki kirinya sehingga kakinya terpaksa dipotong. Plaintif telah memberi keterangan bahawa semasa beliau bekerja dengan defendan kedua sebagai pemandu lori merangkap atendan dan bekerja bersama dengan seorang bernama Hussain bin Mat Isa ('Hussain'), beliau telah diminta oleh seorang lelaki India yang bernama Kumar ('Kumar'), yang juga bekerja dengan defendan kedua sebagai atendan lori JBP 4502 ('lori treler tersebut'), untuk membuka salah satu pintu atau penghadang lori treler tersebut yang mana, pada masa yang material, sarat dengan besi-besi paip. Plaintif melakukan permintaan tersebut. Plaintif telah memberikan keterangan bahawa semasa beliau memukul pin pada pintu atau penghadang yang ketiga dengan tukul, pin tersebut patah dan pintu atau penghadang tersebut terbuka dan dua atau tiga batang besi-besi paip tersebut bergolek jatuh dan terhempap kaki plaintif yang menyebabkan beliau terus pengsan. Plaintif seterusnya memberikan keterangan bahawa tukul tersebut telah diberikan kepada beliau oleh Kumar dan beliau bersetuju untuk menolong Kumar kerana Hussain telah memberitahunya bahawa sekiranya sesiapa daripada syarikat defendan kedua meminta pertolongannya beliau mestilah membantu. Defendan pertama adalah pemilik berdaftar lori treler tersebut yang telah memajakkan lori treler tersebut kepada defendan kedua sebaik sahaja menerima permit daripada pihak berkuasa perlesenan. Defendan pertama tidak menggajikan sesiapa pun berkaitan dengan penggunaan lori treler tersebut dan beliau tiada kawalan atau kuasa ke atas pemandu dan/atau atendan lori treler tersebut. Beliau tidak mengenali plaintif atau siapakah pemandu atau atendan lori treler tersebut. Lori treler tersebut tidak pernah digunakan untuk perniagaan defendan pertama. Bukti yang menyokong telah diserahkan oleh defendan kedua melalui pembayaran gaji defendan kedua pada 30 November 1996 untuk menunjukkan bahawa Kumar dan Hussain tiada di dalam dsenarai pembayaran gaji defendan kedua. Terdapat bukti yang menunjukkan bahawa untuk perjalanan perniagaan dan pengurusan yang lancar dan juga kerana kekurangan lori treler berlesen, defendan kedua sering mengambil perkhidmatan pengangkut-pengangkut lain yang mempunyai lori treler berlesen bersama dengan pemandu-pemandu dan atendan-atendannya sekali. Salah satu daripada mereka adalah YS Repair and Transport Agency. Tiada bukti yang menunjukkan bahawa plaintif diambil oleh defendan kedua untuk bekerja di premis defendan kedua melalui satu kontrak antara plaintif dengan defendan kedua yang menyenaraikan

pembayaran gajinya. Plaintif tidak memanggil Kumar atau Hussain sebagai saksi beliau tetapi adalah kes beliau bahawa kemalangan tersebut berpunca daripada kelalaian pekerja-pekerja atau agen-agen defendan-defendan pertama dan/atau kedua. Adalah dihujahkan bahawa plaintif telah mengambil risiko ke atas dirinya sendiri dan kecuaian sertaan telah diplidkan oleh kedua-dua defendan. Senario mengenai apa yang berlaku pada hari kejadian tersebut berkisar pada keterangan plaintif sendiri dan beliau berpegang kepada pendapatnya bahawa keterangan beliau mengenai bagaimana kemalangan tersebut berlaku adalah lebih selaras dengan kecuaian defendan-defendan daripada dengan lain-lain kausa dan meminta mahkamah memutuskan supaya kedua-dua defendan cuai kecuali jika defendan-defendan dapat memberikan penjelasan yang munasabah bagaimana kemalangan tersebut boleh berlaku tanpa kecuaian defendan-defendan.

Diputuskan, menolak tuntutan plaintif terhadap kedua-dua defendan:

(1) Kedua-dua defendan tidak bertanggungjawab dalam mengambil Kumar dan Hussain bekerja dan juga dalam mengaturkan pemunggahan besi-besi paip daripada lori treler tersebut pada hari kejadian. Defendan pertama hanya meminjamkan namanya kepada defendan kedua agar permit dapat diluluskan oleh pihak berkuasa. Defendan pertama telah dapat menolak dakwaan bahawa Kumar adalah pekerja atau agennya dengan menerangkan bahawa beliau tidak pernah mengenali Kumar dan penglibatannya adalah kecil, menggunakan namanya untuk membeli lori treler tersebut dan tidak pernah dia menggunakan lori treler tersebut untuk perniagaannya. Lori treler tersebut tidak bergerak ketika kemalangan berlaku. Defendan pertama, sebagai pemilik berdaftar lori treler tersebut tidak dapat disangkutkan dengan liabiliti kerana tidak ada keterangan yang menunjukkan bahawa Kumar adalah pekerja atau agen defendan pertama, atau Kumar telah bertindak mengikut arah defendan pertama untuk perniagaannya (lihat ms 251H–252C); *Bank Voor Randall en Scheepvart NV v Slatford* [1953] 1 QB 248 and *Mat Jusoh bin Daud v Sykt Jasa Seberang Takir Sdn Bhd* [1982] 2 MLJ 71 diikuti.

(2) Hanya kerana lori treler tersebut ditempah oleh defendan kedua, ini tidak boleh dianggap dengan sendirinya bahawa Kumar dan Hussain adalah pekerja atau agen defendan kedua. Terdapat keterangan yang menunjukkan bahawa defendan kedua sering menggunakan perkhidmatan pengangkut-pengangkut lain yang mempunyai lori treler berlesen bersama dengan pemandu-pemandu dan atendan-atendannya sekali. Salah satu daripada mereka adalah YS Repair and Transport Agency. Di bawah perkhidmatan yang diberikan oleh YS Repair and Transport Agency, defendan kedua hanya perlu memberi arahan tempat-tempat pemunggahan dan penghantaran; defendan kedua tidak bertanggungjawab untuk memberitahu pemandu bagaimana memandu lori treler tersebut atau jalan mana yang perlu diambil

untuk sampai ke tempat tujuan. Pemandu-pemandu dan atendan-atendan tersebut adalah di bawah penggajian YS Repair and Transport Agency. Daripada keterangan yang diperolehi, YS Repair and Transport Agency adalah kontraktor bebas dan sekalipun YS Repair and Transport Agency didapati cuai, defendan kedua tidak boleh didapati liabiliti vikarius kerana defendan kedua hanyalah penyewa sementara (lihat ms 252G–253D).

(3) Tiada keterangan yang menunjukkan bahawa plaintif diambil oleh defendan kedua untuk bekerja di premis defendan kedua melalui satu kontrak antara plaintif dengan defendan kedua yang menyatakan pembayaran gajinya. Seterusnya, tiada perhubungan di antara plaintif dengan defendan kedua, sama ada sebagai pekerja dengan majikan meskipun kontrak perkhidmatan. Oleh itu, defendan kedua tidak mempunyai kewajipan berjaga-jaga terhadap plaintif di dalam undang-undang common ataupun statut dan tuntutan plaintif untuk kecuaian harus gagal. Bukanlah kedudukan defendan kedua untuk memberi arahan kepada plaintif cara bagaimana untuk melakukan kerja tersebut kerana tiada hubungan terus di antara mereka (lihat ms 253F–G).

(4) Asas kes plaintif adalah berdasarkan sepenuhnya kepada Kumar dan Hussain; tanpa mereka, kes plaintif telah dilemahkan. Seksyen 114(g) Akta Keterangan 1950 mesti dipakai terhadap plaintif. Kegagalan plaintif untuk memanggil Kumar dan Hussain sebagai saksi telah menimbulkan anggapan terhadap plaintif (lihat ms 255H–I).

(5) Terdapat percanggahan yang terang dan material di dalam keterangan plaintif mengenai kemalangan tersebut dan ini telah membahayakan kes plaintif. Terdapat ketidakselarasan yang jelas dalam keterangan plantif. Keterangan tersebut tidak dapat menyokong plaintif dan oleh itu, tuntutannya mesti gagal (lihat ms 259B).

(6) Daripada keterangan di hadapan mahkamah, defendan pertama telah berjaya menunjukkan bahawa plaintif faham dengan sepenuhnya akan risiko dan bahaya menarik keluar pin tersebut dan plaintif telah melakukannya secara sukarela (lihat ms 262D).

(7) Plaintif mempunyai kewajipan berjaga-jaga terhadap dirinya sendiri. Keterangan plaintif menunjukkan bahawa hanya beiau seorang yang telah cuai dan bertanggungjawab terhadap kemalangan tersebut (lihat ms 262G–H)

(8) Maxim res ipsa loquitor tidak boleh dipakai di sini kerana plaintif tahu akan sebab kemalangan tersebut. Ianya adalah kerana kecuaian plaintif dalam mengeluarkan pin tersebut yang menyebabkan besi-besi paip tersebut jatuh dan menghempapnya. Maxim res ipsa loquitor tidak boleh dipakai bila sebab kemalangan telah diketahui (lihat ms 263I–264B).

Cases referred to

Anns v Merton London Borough Council [1978] AC 728 (refd)
Azman bin Kasri & Anor v Md Isa bin Endut & Govt of Malaysia

A [1988] 2 CLJ 743 (refd)
Bank Voor Handell en Scheepvart NV v Slatford [1953] 1 QB 248 (follld)
Barkway v South Wales Transport Co Ltd [1950] 1 All ER 392 (refd)
Bennett v Tugwell (an infant) [1971] 2 All ER 248 (refd)
Bolton v Stone [1951] AC 850 (refd)
B *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 (refd)
Bridge v Grand Junction Railway (1838) 3 M & W 244 (refd)
Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152 (refd)
Cavanagh v Ulster Weaving Co Ltd [1959] 3 WLR 262 (refd)
Davies v Swan Motor Co (Swansea) Ltd [1949] 2 KB 291 (refd)
C *De Cotta v Tan Hock Lee* [1972] 2 MLJ 173 (refd)
Donoghue v Stevenson [1932] AC (refd)
Du Cros v Lambourne [1907] 1 KB 40 (refd)
Durga v Mathura 15 CWN 717 (refd)
Hewitt v Bonvin [1940] 1 KB 188 (refd)
D *Karuppan Bhoomidas v Port of Singapore Authority* [1978] 1 WLR 189; [1978] 1 MLJ 49 (refd)
Langham v Governors of Wellingborough School (1932) 101 LJ KB 513 (refd)
Launchbury & Ors v Morgans & Ors [1971] 2 QB 245 (refd)
Lee Chong v Tan Kwee Low & Anor [1961] MLJ 98 (refd)
E *Letang v Ottawa Electric Railway Co* [1926] AC 725 (refd)
Liew Soon Oi v Yap Fui Thong & Anor; Liew Seck Chong v Yap Fui Thong & Anor [1956] MLJ 181 (refd)
Mat Jusoh bin Daud v Sykt Jaya Seberang Takir Sdn Bhd [1982] 2 MLJ 71 (follld)
F *Mersey Docks and Harbour Board v Coggins & Griffiths (Liverpool) Ltd & Anor* [1947] AC 1 (refd)
Mohd Tajuddin bin Salleh v Mokhari bin A/L Murgis & Anor [1993] 3 CLJ 42 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Nance v British Columbia Electric Railway [1951] AC 601 (refd)
G *Ng Kat Seng v Selvaraju* (1990) MMD Aug 821 (refd)
Nicholas v FJ Sparkes & Son [1945] 1 KB 309 (refd)
Norton v Canadian Pacific Steamships Ltd [1961] 2 All ER 785 (refd)
Ormrod & Anor v Crosville Motor Services Ltd [1953] 2 All ER 753 (refd)
Osborne v The London and North Western Railway Co (1888) 21 QBD
H 220 (refd)
R v Southern Canada Power Co [1937] 3 All ER 923 (refd)
Red and Yellow Omnibus Co Sdn Bhd & Teoh Soo Yew v Chuah Lay Boon [1993] 2 CLJ 481 (refd)
Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor [1993] 4 CLJ 291 (refd)
I *Scruttons Ltd v Midland Silicones Ltd* [1962] 1 All ER 1 (refd)
Shlvanathan v Chang Chong Foo & Anor (1991) MMD Aug 874 (refd)
Tea Hock Chong v Razali bin Hanafiah (1990) MMD June 1990 (refd)
Teoh Khoon Lim v Lim Ah Choo & Anor [1970] 2 MLJ 220 (refd)

Thomas v Quartermaine (1887) 18 QBD 685 (refd)
Veeriah all Punnusamy v Lee Yap t/a Sem Leong Timber Trading Co [1989] 1 CLJ 73 (refd)
Yarmouth v France (1887) 19 QBD 647 (refd)
Yuen Kun Yeu & Ors v A-G of Hong Kong [1988] 1 AC 175 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Employees' Social Security Act 1969

S Gunasegaran (*John Ang & Jega*) for the plaintiff.
Ong Chee Yong (*Ong & Ong*) for the first defendant.
John Yeo Chun Ming (*Iqbal, Hakim, Sia & Voo*) for the second defendant.

Abdul Malik Ishak J: The plaintiff claimed damages from the defendants for personal injuries and losses suffered by him arising from an accident which occurred on 24 November 1989 at about 8.25pm at or near the second defendant's premises at Jalan Ah Siang, Johor Bahru. It was the plaintiff's case that the accident was caused by the negligence of the servants or agents of the first and/or the second defendants.

Briefly, in his evidence, the plaintiff testified that on 24 November 1989 while he was under the employment of the second defendant as a lorry driver cum attendant and worked with one Hussain bin Mat Isa ('Hussain'), he was requested by an Indian man by the name of Kumar ('Kumar'), who was employed by the second defendant as an attendant in motor-lorry JBP 4502 (it should be a motor-lorry trailer and it is proposed to describe it as such), to open one of the doors or barriers of the motor-lorry trailer which, at the material time, was laden with iron pipes. The plaintiff acceded to the request. The motor-lorry trailer had a total of eight doors or barriers — three on each side and one in front and one at the back. These doors or barriers were secured by means of pins. It was in evidence that to open the door or barrier it can only be done by hitting the pin with a hammer. Thus, whilst the plaintiff was hitting the pin to the third door or barrier with a hammer, the pin broke and the door or barrier was flung open and a few pieces of iron pipes (two or three in number) rolled down and struck the plaintiff's left leg causing him to lose consciousness. The plaintiff testified that the hammer was given to him by Kumar and that he agreed to help the latter because Hussain had previously told him that if anyone from the second defendant's company asked for any help he should be obliged to assist. As a result of the accident the plaintiff suffered a crush injury to his left leg with compound communited fracture of tibia and fibula, cut muscle, tendons, nerves and vessels which resulted in traumatic amputation of his left leg. The plaintiff testified that due to his disability, he had lost his job as a lorry driver cum attendant and to date he has not been able to take up any other employment. It was the plaintiff's case that his injuries were occasioned by the negligence of Kumar because Kumar requested him to remove the door or barrier of the motor-lorry trailer by hitting the pin with a hammer when he (Kumar) knew or ought to have known that it was dangerous to remove the door or barrier in that manner.

The plaintiff's cause of action was thus founded on negligence. But before proceeding to discuss the issue of negligence, what is germane to ascertain here was whether or not Kumar was the servant or agent of the first and/or the second defendants and for this exercise, I shall examine the doctrine of vicarious liability. Lord Denning MR in *Launchbury & Ors v Morgans & Ors* [1971] 2 QB 245 especially at p 253 explained the doctrine of vicarious liability in this way:

> What is the basis of this doctrine of vicarious liability? To answer it, I would first ask: what does 'vicarious' mean? I turn to the *Shorter Oxford English Dictionary* (3rd Ed,1944) Vol II. It means one 'that takes or supplies the place of another ... '. So vicarious liability means that one person takes the place of another so far as liability is concerned. Familiar instances are where the master shoulders the liability of his servant: or the principal shoulders the liability of his agent: and so forth. Whenever the law imposes vicarious liability, it does so for reasons of social policy — reasons which commend themselves to the people at large. If a servant injures another by his negligence, his master should answer for it. If an agent deceives another by his fraud, his principal should make good the loss. It does not matter whether the servant or agent is acting for the benefit of his master or principal, or not. Suffice it that the master or principal has put him in a position where he may do injury to another: and should be liable for the way in which he conducts himself therein. It is true that the master or principal is not personally at fault. But it is only right that he should be made vicariously liable. Otherwise it would mean that the injured person would get no redress: for, more often than not, the servant or agent has not the means to pay: whereas his master or principal has the means: or at any rate, ought to insure against the liability so as to get the means to pay. In this way the innocent victim is not left to bear the whole loss himself. It is distributed amongst the community in a way that is fair to all.

Perhaps it is appropriate to set out the facts in *Launchbury*'s case (supra) in order to understand the rationale of the doctrine of vicarious liability as enunciated by Lord Denning MR better. In that case, a motorcar owned by a wife and registered and insured in her name was regarded by her and her husband as the family car. The husband used it daily to go to and return from work. He had his wife's permission to get a sober friend to drive if he was not fit to drive himself. She told the husband: 'Mind, then, that you choose a friend who is absolutely sober.' On 4 August 1964, the husband telephoned the wife about 7pm to tell her that he was going out for the evening. About 7.30pm the husband, who had been drinking, was in a public house. When told that he was not in a fit state to drive he said that he had a chauffeur, indicating one Danny Cawfield who was with him. Later, in another public house, the husband and Danny Cawfield met the three plaintiffs and at closing time Danny Cawfield said he would give them a lift home. They all got into the car. Danny Cawfield drove. He drove very fast into an oncoming bus. He and the husband were both killed and the plaintiffs were injured. The plaintiffs sued the representatives of the husband and Danny Cawfield for the latter's negligent driving as the servant or agent of the husband. The wife was added as personal defendant on the ground that Danny Cawfield drove as her servant or agent. Stirling J in the court of first instance found that there was an understanding between the husband and wife that the husband would never drive if he

had taken more drink than he felt that he should have taken but would either get a friend to drive him or ring her up for her to fetch him; and he gave judgment against all the defendants. On appeal by the wife personally, the Court of Appeal dismissing the appeal and affirming the decision of Stirling J (Megaw LJ dissenting) held that the wife was vicariously liable for the negligent driving of Danny Cawfield since (per Lord Denning MR) in asking Danny Cawfield to drive, the husband was doing what the wife had asked him to do if he had taken too much to drink and, moreover, Danny Cawfield was driving her car in her interest in getting her husband and the car home. Edmond Davies LJ was of the view that Danny Cawfield should in the circumstances be treated as if he had driven the car at the request of the wife given by her husband.

It is a correct statement of law to say that a principal is only liable for the tortious acts committed by his agent where:

(1) the agent has been expressly and unequivocally authorized by the principal to do the particular act from which the tortious liability results;

(2) the agent's tortious act has been subsequently ratified expressly by the principal; and

(3) the agent has acted within the full scope and ambit of his general authority.

Scruttons Ltd v Midland Silicones Ltd [1962] 1 All ER 1 (HL) established the now famous rule that a principal may be able to claim the benefit of the terms of a contract made by his agent which limit the agent's liability for tortious acts.

It is also not out of place to say and I so say without reservations that a master is vicariously liable for the acts of his servant which are tortious, or which necessarily lead to and result in a tort, where the master has expressly by word or conduct authorized or subsequently ratified the acts or in situations where the acts are done within the apparent scope of the servant's authority when the servant is acting within and in the course of his employment. On the other hand, on the authority of *Norton v Canadian Pacific Steamships Ltd* [1961] 2 All ER 785 (CA), an employer is not liable for the torts committed by an independent contractor in the course of his employment unless: (a) the employer fully retains control over, or interferes from time to time with the performance of the contractor's work; or (b) a personal duty of care on the employer's part exists either at common law or by statute.

Salleh Abas FCJ in *Mat Jusoh bin Daud v Sykt Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71 especially at p 74 examined in some detail the appropriate test to determine the existence of relationship of master and servant and his Lordship had this to say:

> The notion of control as a test to determine the existence of relationship of master and servant has lost a good deal of its importance because under modern conditions no control as to how work is to be done can be directed to such professionally trained employees as engineers, architects, lawyers, managers, doctors and many others: *Morren v Swinton & Pendlebury BC* [1965] 1 WLR 576, 582. This notion is also becoming unrealistic because

the majority of employers today are corporate entities who have to act through human agencies. Thus the absence of control is no longer conclusive as to the existence or otherwise of the relationship of master and servant. Various attempts were made at finding a satisfactory test. One such test is stated by Denning LJ in *Stevenson, Jordan and Harison Ltd v Macdonald* [1952] 1 TLR 101, 111 as follows:

> 'It is often easy to recognize a contract of service when you see it, but difficult to say wherein the distinction lies. A ship's master, a chauffeur and a reporter or a staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi man and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that under a contract of services, a man is employed as part of the business, and his work is done as an integral part of the business, whereas under a contract for services, his works, although done for the business, is not integrated into it but is only accessory to it.'

This test was repeated by Denning LJ in *Bank Voor Handell en Scheepvart NV v Slatford* [1953] 1 QB 248, 295 as follows:

> 'The test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organization.'

In another part of his judgment in *Mat Jusoh*'s case (supra) his Lordship Salleh Abas FCJ continued in these words:

> Another test was suggested by Lord Wright in *Montreal v Montreal Locomotive Works Ltd* [1947] 1 DLR 161 as being appropriate in some cases. This is a composite test involving elements of: (1) control; (2) ownership of the tools; (3) chance of profit; and (4) risk of loss. In other words the test which can be applied should be wide enough to cover the taking of account of investment and risk. Thus he who owns the assets and bears the risk is unlikely to be acting as an agent or a servant. Such person in fact could be described as carrying on his own business: *Ready Mixed Concrete v Minister of Pensions and National Insurance* [1968] 2 QB 497, 521 per MacKenna J at p 521.
>
> Applying the test of organization laid down by Denning LJ quoted above, it is clear that what was done by Lim and the workmen procured by him was done as an integral part of the defendants' business. Lim procured the workmen for the defendants' business, and the workmen cut or split the logs also for the business of the defendants. Under no circumstances could they be held to be working for Lim. After all the essence of a contract of service is the supply of labour and skill by a servant to the master. It is to the defendants and not to Lim that these workmen supplied their service and skill. Even on the question of control, the ultimate authority to decide whether a log was to be sawn or not and how many logs were to be sawn obviously resided with the defendants who conveyed their decisions through their supervisors. In the circumstances I therefore have no hesitation to hold that the plaintiff was an employee of the defendants.

Again, speaking of the relationship of master and servant the following passages appearing in 25 *Halsbury's Laws of England* (3rd Ed) at pp 447 and 448 seem to throw some light upon the characteristics of such relationship:

> Whether or not, in any given case, the relationship of master and servant exists is a question of fact; but in general the relationship imports the existence of power in the employer not only to direct what work the servant

> is to do, but also the manner in which the work is to be done. A person may be the servant of another although a third party has the power of appointing or dismissing him or of requiring his dismissal, or has powers of direction and control in regard to his work, or pays him his wages. A person may be a servant although remunerated otherwise than by wages, or although only employed at will; and the relation is not destroyed because the master works with the servant. A person may be a servant to different masters; and a contract for exclusive personal service does not necessarily establish the relation of master and servant.
>
> A servant of a sub-contractor is not, prima facie, the servant of the main contractor, though a servant of one employer may become the servant of another pro hac vice where services are lent (see also same volume of *Halsbury's* at pp 501, 502 and 503).

An examination of the evidence in the present case would reveal, firstly, that the first defendant was the registered owner of the motor-lorry trailer at the material time and, secondly, he denied under oath that he was vicariously liable to the plaintiff as he was neither the employer nor the principal in relation to the use of the motor-lorry trailer. From the available evidence, the first defendant was nothing more than a mere holder of a class 'A' carrier permit for the motor-lorry trailer which had been leased out to the second defendant almost immediately after the issuance of the permit by the licensing authorities. In my judgment, the first defendant was not even the beneficial owner of the motor-lorry trailer as he did not contribute a single cent towards its purchase and neither did he receive any part of the proceeds when it was sold. I venture to say, on the available evidence, that the first defendant had no care or custody over the motor-lorry trailer for the following reasons:

(i) he did not pay the road tax of the motor-lorry trailer;

(ii) he did not pay for the maintenance costs nor the insurance coverage of the motor-lorry trailer.

and for the same reasons, I so hold that the first defendant had no right to direct as to how the motor-lorry trailer was to be used or for that matter to decide whether the motor-lorry trailer should be sold. It is pertinent to emphasize that the first defendant did not employ any person in relation to the use of the motor-lorry trailer and he had no control or authority at all over the driver and/or attendant whoever they may be. In fact, the first defendant did not know the plaintiff or who the driver or attendant of the motor-lorry trailer was. There was clear unequivocal evidence that the motor-lorry trailer was not used at anytime for the business of the first defendant but rather it was solely utilized for the business of the second defendant. Of pertinence would be the evidence of the plaintiff elicited during cross-examination which entirely absolved the first defendant. It reads as follows:

> Saya tak kenal defendan pertama. Saya tidak pernah menerima arahan daripadanya. Saya tidak pernah menerima gaji darinya. Kali pertama saya jumpa defendan pertama ialah pada hari ini di mahkamah.

A The amended statement of defence of the first defendant makes for interesting reading especially paras 5, 6 and 7 thereof. For completeness it is reproduced hereinunder:

> Paragraph 5 Defendan pertama kata bahawa dia tidak terlibat langsung dalam kejadian yang berlaku dan/atau tidak patut dijadikan
B pihak dalam tuntutan ini memandangkan dia bukan majikan atau prinsipal kepada sesiapa yang terlibat dalam kemalangan.
>
> Paragraph 6 Defendan pertama juga kata bahawa pada segala masa material, lori no JBP 4502 telah di sewa kepada Tiong Nam Trading & Transport (M) Sdn Bhd dan bahawa dia tidak mempunyai jagaan atau kawalan (custody or control) terhadap
C lori tersebut.
>
> Paragraph 7 Defendan pertama kata bahawa dia tidak mempunyai apa-apa kewajipan undang-undang kepada plaintif (owes no duty of care to the plaintiff).

In *Teoh Khoon Lim v Lim Ah Choo & Anor* [1970] 2 MLJ 220, the Federal
D Court decided the issue of agency in favour of the owner of the car who had loaned that car to the borrower and in the course of which an accident occurred. Azmi LP delivering the maiden judgment said at p 221:

> The question whether a person is an agent of another is substantially a question of fact. The Privy Council in the recent case of *Rambarran v*
E *Gurrucharran* [1970] 1 All ER 749 referred to a judgment of the Court of Appeal of New Zealand in the case of *Manawatu County v Rowe* [1956] NZLR 78 and summarized the principles laid down by that court in the following terms:
>
> > 'After considering the English cases of *Barnard v Sully* (1931) 47 TLR 557 and *Hewitt v Bonvin* [1940] 1 KB 188 and certain New Zealand
> F and Australian cases dealing with the same problem, the Court of Appeal stated the principles which it deduced therefrom thus:
> >
> > (1) The onus of proof of agency rests on the party who alleges it.
> >
> > (2) An inference can be drawn from ownership that the driver was the servant or agent of the owner, or in other words, that this fact is
> G some evidence fit to go to a jury. This inference may be drawn in the absence of all other evidence bearing on the issue or if such other evidence as there is, fails to counterbalance it.
> >
> > (3) It must be established by the plaintiff, if he is to make the owner liable, that the driver was driving the car as the servant or agent of the owner and not merely for the driver's own benefit and on his
> H own concern.'
>
> In my view even if assuming that the learned judge was right that this was a case of surreptitious hiring, that fact has not created a relationship of principal and agent as between the two defendants in this case. The evidence in this case would appear in my view conclusive that the first defendant used the car for his own benefit and on his own concern and for that reason I
I would say that the second defendant would not be liable for the negligence of the first defendant. I would allow the appeal with costs here and in the court below.

Suffian FJ in a concurring judgment and in the same vein had this to say:

> The car responsible for the accident was owned by the second defendant (appellant). There was therefore a presumption that the driver who drove it at the time of the accident (first defendant and second respondent here) was the agent of the owner. Whether or not he was an agent is a question of fact. As was said in the Privy Council case referred to by my Lord the Lord President, the owner can repel the inference that the driver was his agent in one of two ways: one, by giving or calling evidence as to the driver's object in making the journey in question, and, secondly, by simply asserting that the car was not being driven for the owner's purpose and proving that assertion by means of such supporting evidence as was available to him.
>
> Here the owner adopted both ways of proving that he had no interest or concern in the driver's journey. The driver used the car to convey his own goods to some people in Kepala Batas and the owner did not ask him to convey anything for him or do anything for him there. Even if it is true that the car had been surreptitiously hired, I do not think that in these circumstances it can be said that the owner had any interest or concern in the driver's journey.

Applying *Teoh Khoon Lim*'s case (supra) to the present case, it is also a question of fact whether Kumar was the servant or agent of the first and/or the second defendants. Kumar was not called by the plaintiff to the stand and without the benefit of Kumar's evidence, it is my judgment that the plaintiff had failed to prove the issue of agency.

The issue of bailment was discussed in the case of *Lee Chong v Tan Kwee Low & Anor* [1961] MLJ 98 and there the facts were that the first defendant, the owner of a car, allowed his brother-in-law to borrow his car with the knowledge that the car was to be lent to the second defendant for use for a period of 10 days. Whilst the second defendant was driving the car, some days later, he was involved in a collision with the plaintiff. The second defendant was not covered by any third party risks insurance, and the plaintiff was therefore left to recover such damages as he might by suing the defendants. On the evidence before him the learned trial judge (Neal J whose judgment was reported in [1960] MLJ 212) held that the transaction between the parties was not a bailment of the car by the first defendant to his brother-in-law for use by the second defendant. He held that at the time of the accident the second defendant was driving the car as the agent, whether express or implied, of the first defendant, and accordingly the first defendant was liable to the plaintiff. On appeal, the Court of Appeal (Thomson CJ, Hill JA and Rigby J) reversed the decision of Neal J and held that the first defendant had parted with his car unconditionally, retaining neither control nor the right to exercise any control over it. It was a clear instance of bailment and accordingly the first defendant was not responsible for the negligence of the second defendant. Thomson CJ in a short judgment said at p 98:

> As is pointed out by the late Professor Holdsworth in his 'History of English Law' (Vol VIII at p 474) 'the foundation of the modern law' relating to the vicarious liability of a master or principal for the torts of his servant or agent is to be found in a series of judgments of Holt CJ towards the end of the 17th century. To this day what is probably the most helpful and compendious statement of the law on the point is to be found in the case of *Turbervil v Stamp* (1697) Comb 459:

> 'If my servant doth any thing prejudicial to another, it shall bind me, where it may be presumed that he acts by my authority, being about my business.'
>
> In view of the nature of some of the arguments which have been addressed to us in the present case I hasten to add that in my view this statement is equally true if the word 'agent' be substituted for the word 'servant'. The important words are 'being about my business'.

Hill JA delivering a concurring judgment said at p 99:

> In the present case the owner had parted with his car unconditionally and he retained neither control nor the right to exercise any control over it. It was a clear instance of bailment and it follows that he was not responsible to a third party for the negligence or wrongful act of the bailee.

In a fairly long judgment, Rigby J set out the law in extenso and, inter alia, he had this to say (at p 100):

> Upon the evidence before the trial court the transaction between the parties was, in my view, a gratuitous bailment or loan of the car by the first defendant to his brother-in-law with the knowledge that the car was to be lent to the second defendant for his use for a period of 10 days.

Further down the page, Rigby J continued in serious vein:

> On the contrary, although the first defendant had an undisputed right at any time to require the car to be returned to him, during the subsisting period of the loan while the car was in the actual physical possession of the second defendant the first defendant had clearly abandoned his power of dominion and right of control over the car. It is clear from the judgment of Lord Atkinson in *Samson v Aitchinson* [1912] AC 344 at p 350, to which I will later refer, that the 'right of control' means the right to control the way in which the car is being driven.

No doubt the facts in *Lee Chong v Tan Kwee Low & Anor* [1961] MLJ 98 are poles apart from the present case, yet the principles are still germane and when applied to the present case it will be appreciated that the law on vicarious liability can easily be stated, but the difficulty lies in the application of the law to the facts of a particular case. Here the plaintiff did not call Hussain or Kumar as his witnesses and the whole scenario of what had happened on that fateful day revolved on the evidence of the plaintiff himself. The first defendant as explained earlier had no care or custody nor control or authority in regard to the motor-lorry trailer. Applying the organization test as propounded by Denning LJ in *Bank Voor Handell en Scheepvart NV v Slatford* [1953] 1 QB 248 as adopted by Salleh Abas FJ in *Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71 to the facts of the present case, both the defendants were not responsible for the employment of Kumar and Hussain and neither were they responsible for the organization of removing the iron pipes from the motor-lorry trailer on that fateful day. The first defendant was nothing more than an 'Ali Baba' out to make a quick buck by lending his name to the second defendant so that the issuance of the permit by the licensing authorities would be approved. The first defendant had repelled the inference that Kumar was his servant or agent by giving evidence and asserting, which he did, that he never knew Kumar and that his role was only minimal, viz lending his name for the purchase of the motor-lorry

trailer and at no time did he use the motor-lorry trailer for his business. The first defendant's legal liability, if at all it existed and in my judgment no such liability existed, can best be summed up in the words of Denning LJ in the case of *Ormrod & Anor v Crosville Motor Services Ltd* [1953] 2 All ER 753 especially at p 755:

> The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friends, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern.

As can be seen from the facts, the motor-lorry trailer was stationary when the purported accident as narrated by the plaintiff occurred. No liability can be attached to the first defendant as the registered owner of that motor-lorry trailer as there was no evidence that Kumar was the servant or agent of the first defendant nor was there evidence that Kumar had acted on the instructions of the first defendant in the course of the first defendant's business. As was said in *Du Cros v Lambourne* [1907] 1 KB 40 that 'the duty to control postulates the existence of the right to control. No doubt if the actual possession of the equipage has been given by the owner to a third person — that is to say, if there has been a bailment by the owner to a third person — the owner has given up his right of control.'

In my judgment, the plaintiff failed to prove his case not only against the first defendant, but also that of the second defendant. The second defendant too had repelled the inference that Kumar was his servant or agent by taking the stand through its representative and asserted categorically this fact (*Teoh Khoon Lim v Lim Ah Choo & Anor* [1970] 2 MLJ 220). Supporting evidence was also tendered by the second defendant by way of exh D2 the monthly salary/wages of the second defendant for 30 November 1996 to show that not only Kumar but also Hussain were not on the second defendant's payroll list. In my judgment, the mere fact that the motor-lorry trailer was used to transport goods commissioned by the second defendant cannot on its own give rise to a presumption that Kumar and Hussain were the servants and/or agents of the second defendant. There was evidence that it was the practice of the second defendant, for business efficacy and management and for lack of licensed motor-lorry trailers in its stable, to engage the services of other transporters with licensed motor-lorries complete with its drivers and attendants. YS Repair and Transport Agency was one of the transporters in which the second defendant had engaged the services of their licensed lorries together with the drivers and attendants. Under the services rendered by YS Repair and Transport Agency, the second defendant's role was only to give instructions in regard to the point of pick-up and the point of delivery; the second defendant was not responsible to dictate to the driver as to how to drive that motor-lorry or to select the desired route in order to arrive at the point of destination. These drivers and attendants were all under the payroll of YS Repair and Transport Agency. From the available evidence, it is my judgment that YS Repair and Transport Agency were independent contractors and even if YS Repair and Transport Agency were held to be negligent (this cannot be the case as they are not parties to this civil suit),

A the second defendant as temporary hirer cannot be held vicariously liable for the accident. I am fortified in my view by the decision of *Karuppan Bhoomidas v Port of Singapore Authority* [1978] 1 WLR 189; [1978] 1 MLJ 49 where the court there followed the decision in *Mersey Docks and Harbour Board v Coggins & Griffiths (Liverpool) Ltd & Anor* [1946] 2 All ER 345 and held that the onus of proof rests on the general or
B permanent employers (in the present case before me it would be YS Repair and Transport Agency) to shift the prima facie responsibility for the negligence of servants engaged and paid by such employer (as I said in the present case it would be YS Repair and Transport Agency) to the hirer (in the context of the present case it would be the second defendant) who for
C the time being has the advantage of the service rendered. In the present case as YS Repair and Transport Agency was not cited as a party by the plaintiff, the burden of proof has not been successfully discharged. It is pertinent to point out that *Karuppan Bhoomidas'* case (supra) also laid down the rule that partial control by the hirer (in the context of the present case it should be the second defendant) was not enough and that entire
D and absolute control was necessary in order to transfer liability from the shoulders of the employer (here it would be YS Repair and Transport Agency) who engaged, paid and regularly employed and have the power of dismissal, onto the shoulders of those who have hired the servants' services. In the present case there was no such evidence.

E Lord Keith of Avonholm in *Cavanagh v Ulster Weaving Co Ltd* [1959] 3 WLR 262 at p 273 said that:

> The ruling principle is that an employer is bound to take reasonable care for the safety of his workman and all other rules or formulae must be taken subject to this principle.

F Now, there was no evidence that the plaintiff was employed by the second defendant to work on the second defendant's premises pursuant to a contract between himself and the second defendant which fixed his remuneration. Consequently, there was between the plaintiff and the second defendant no relationship of master and servant, or employer and
G employee, not even a contract for services. The second defendant thus owed the plaintiff no duty of care at common law or even under statute and his claim for negligence must therefore fail. The second defendant was not in a position to give orders to the plaintiff as to how to do the job as there was absolutely no causal link between them at all. The question to ask as was asked in *Mersey Docks and Harbour Board v Coggins & Griffith*
H *(Liverpool) Ltd & Anor* [1947] AC 1 is this: 'Who is entitled to give the orders as to how the work should be done?' The answer would certainly not be the second defendant.

Nicholas v FJ Sparkes & Son [1945] 1 KB 309 lays down the following rule:

I

> Where a vehicle is let out on hire with the service of its driver, and an accident occurs through the negligent act of the driver causing personal injuries to a third person, one test in considering who is the superior of the negligent workman for the purpose of the maxim 'respondeat superior', is the answer to the question whether the workman in the doing of the negligent act was exercising the discretion given to him by his regular

> employer, or whether he was obeying a specific order of the hirer for whom, on his employers' direction, he was using the vehicle. A

Applying the maxim 'respondeat superior' to the present case one can safely say that the second defendant had no linkage with the plaintiff at all. If at all, the negligence should be with YS Repair and Transport Agency and not the second defendant. B

It is germane, at this juncture, to cite the following passages from the judgment of MacKinnon LJ in the case of *Hewitt v Bonvin* [1940] 1 KB 188 especially at p 191 where guidance can be obtained thereof:

> If A suffers damage by the wrongful act of B, and seeks to say that C is liable for that damage he must establish that in doing the act B acted as the agent or servant of C. If he says that he was C's agent he must further show that C authorized the act. If he can establish that B was the servant of C the question of authority need not arise. A master is jointly and severally liable with his servant for any tort committed by the servant in the course of his employment. If in this case the plaintiff is to make Bonvin the father liable for the damages he claims he must establish that the son was driving the car as the servant of his father and in the course of his employment. C D

Applying *Hewitt*'s case (supra) to the present case, the plaintiff must prove that Kumar was the servant or agent of the second defendant and towards this end the plaintiff has failed to do so.

In *Liew Soon Oi v Yap Fui Thong & Anor; Liew Seck Chong v Yap Fui Thong & Anor* [1956] MLJ 181, the learned judge found as a fact that the first defendant was driving motorcar SC 81 with the consent and permission of the second defendant, the owner. The second defendant, apart from being the owner of the said motorcar, appeared to have had no control over the motorcar at all. There was no evidence whatever as to the first defendant being his servant or agent. On these facts, and rightly so, the court held that the first defendant was liable in damages to the plaintiffs in both actions. The court also held that the claim in both actions as against the second defendant failed. E F

The law can be shortly stated thus. The owner of a motorcar is liable for the consequences of the negligent driving of that motorcar by one who is his servant. But the vicarious liability of the owner of a motorcar for the consequences of someone else's negligent driving of the motorcar is not limited to those cases where the driver is his servant. The extension of vicarious liability, and the limit of that extension, was succinctly explained by du Parcq LJ in his judgment in *Hewitt v Bonvin* (supra) as follows: G H

> The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it can be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty. I

I venture to say that even if both the defendants were the employers or principals in relation to the use of the motor-lorry trailer, which is not the case here, the plaintiff still has the onerous duty to prove that his injuries were occasioned by the negligence of the servants and/or agents of both the defendants. The plaintiff's attempt to show a connection through Hussain and Kumar was at best tenuous if not tedious. It was entirely an exercise

in futility. For fear of repetition, the plaintiff said that at the material time he was an attendant cum driver for the lorry of one Hussain. But Hussain's lorry was not the motor-lorry trailer in question. Surprisingly the plaintiff admitted that 'Hussain tidak arah saya buka lori treler itu (referring to the motor-lorry trailer in question).' From this brief recital, it would be correct to sum up that the plaintiff had no business whatsoever to be with the motor-lorry trailer. The plaintiff attempted to justify his action of approaching the motor-lorry trailer by testifying that he was asked by a boy whom he had seen before on the day of the accident itself to help that boy to open a door or barrier of the motorlorry trailer and he obliged having reminded himself that: 'Encik Hussain ada pernah beritahu saya jika ada orang suruh saya bantu, saya harus bantu.' Yet that boy who was alleged to be Kumar was not called to give evidence on behalf of the plaintiff. Hussain too was not called by the plaintiff even though he was present during the duration of the trial. Section 114 of the Evidence Act 1950 ('the Act') allows the court to:

> ... presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

and I hasten to add that the discretion vested to the court must always be exercised judiciously and not arbitrarily. Illustration (g) of s 114 of the Act allows the court to presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. The scope of s 114 (g) of the Act was amply drawn by Mohamed Azmi SCJ (now FCJ) in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 especially at p 494 when he said:

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

Now, the question to ask would be this: Would Kumar and Hussain be considered as important and material witnesses to the case especially to the unfolding of the evidence before the court? The answer would be in the positive. The foundation of the plaintiff's case was based entirely on Kumar and Hussain; without them the plaintiff's case weakened and it is my judgment that s 114 (g) of the Act should be vigorously applied against the plaintiff. Under the circumstances, it is next to impossible to overlook the significance which can be attached to the failure of the plaintiff to put both Kumar and Hussain in the witness box and that failure raises a presumption against the plaintiff: *Durga v Mathura* 15 CWN 717, 721–722 10 IC 963 PC. As I said earlier Hussain was present in court during the progress of the trial yet the plaintiff took the risk in not calling him.

Reverting back to the issue of negligence, it is germane to quote Alderson B in the case of *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 at p 784 on the definition of the word negligence. He said:

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

Clearly this definition of negligence falls far short of what Lord Keith of Kinkel said in the case of *Yuen Kun Yeu & Ors v A-G of Hong Kong* [1988] 1 AC 175 because it did not speak of any duty of care and, consequently, it did not consider what degree of care was required; it merely defined negligence in the abstract to mean nothing more than careless conduct. The law has since developed in such rapid pace that the definition of negligence has taken a different complexion entirely. Lord Keith of Kinkel in *Yuen Kun Yeu & Ors v A-G of Hong Kong* applied the dicta of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 when he said at p 192 of the report:

> *Donoghue v Stevenson* (supra) established that the manufacturer of a consumable product who carried on business in such a way that the product reached the consumer in the shape in which it left the manufacturer, without any prospect of intermediate examination, owed the consumer a duty to take reasonable care that the product was free from defect likely to cause injury to health. The speech of Lord Atkin stressed not only the requirement of foreseeability of harm but also that of a close and direct relationship of proximity. The relevant passages are at pp 580, 581 and 582:
>
> > 'Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'
> >
> > 'I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.'
> >
> > 'There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises.'
>
> Lord Atkin clearly had in contemplation that all the circumstances of the case, not only the foreseeability of harm, were appropriate to be taken into account in determining whether a duty of care arose.

At p 190 of his judgment, Lord Keith of Kinkel in *Yuen Kun Yeu & Ors v A-G of Hong Kong* [1988] 1 AC 175 considered in great depth the dictum of Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728 at pp 751–752 when his Lordship said:

> The issues in the appeal raise important issues of principle, having far-reaching implications as regards the potential liability in negligence of a wide variety of regulatory agencies carried on under the aegis of central or local government and also to some extent by non-governmental bodies. Such agencies are in modern times becoming an increasingly familiar feature of the financial, commercial, industrial and social scene.
>
> The foremost question of principle is whether in the present case the commissioner owed to members of the public who might be minded to deposit their money with deposit-taking companies in Hong Kong a duty, in the discharge of his supervisory powers under the Ordinance, to exercise

reasonable care to see that such members of the public did not suffer loss through the affairs of such companies being carried on by their managers in fraudulent or improvident fashion. That question is one of law, which is capable of being answered upon the averments assumed to be true, contained in the plaintiffs' pleadings. If it is answered in the negative, the plaintiffs have no reasonable cause of action, and their statement of claim was rightly struck out.

The argument for the plaintiffs in favour of an affirmative answer to the question started from the familiar passage in the speech of Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728 at pp 751-752:

> 'Through the trilogy of cases in this House — *Donoghue v Stevenson* [1932] AC 562, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, and *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 — the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: ...'

This passage has been treated with some reservation in subsequent cases in the House of Lords, in particular by Lord Keith of Kinkel in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, 240, by Lord Brandon of Oakbrook in *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785, 815, and by Lord Bridge of Harwich in *Curran v Northern Ireland Co-ownership Housing Association Ltd* [1987] AC 718. The speeches containing these reservations were concurred in by all the other members of the House who were party to the decisions. In *Council of the Shire of Sutherland v Heyman* (1985) 59 ALJR 564 Brennan J in the High Court of Australia, indicated his disagreement with the nature of the approach indicated by Lord Wilberforce, saying, at p 588:

> 'Of course, if foreseeability of injury to another were the exhaustive criterion of a prima facie duty to act to prevent the occurrence of that injury, it would be essential to introduce some kind of restrictive qualification — perhaps a qualification of the kind stated in the second stage of the general proposition in *Anns*. I am unable to accept that approach. It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed." The proper role of the "second stage", as I attempted to explain in *Jaensch v Coffey* [(1984) 58 ALJR 426, 437, 438], embraces no more than "those further elements [in addition to the neighbour principle] which are appropriate to the particular category of negligence and which confine the duty of care within narrower limits

than those which would be defined by an unqualified application of the neighbour principle."' A

Their Lordships venture to think that the two stage test formulated by Lord Wilberforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than it merits, and greater perhaps than its author intended. Further, the expression of the first stage of the test carries with it a risk of misinterpretation. As Gibbs CJ point out B in *Council of the Shire of Sutherland v Heyman*, 59 ALJR 564, 570, there are two possible views of what Lord Wilberforce meant. The first view, favoured in a number of cases mentioned by Gibbs CJ, is that he meant to test the sufficiency of proximity simply by the reasonable contemplation of likely harm. The second view, favoured by Gibbs CJ himself, is that Lord Wilberforce meant the expression 'proximity or neighbourhood' to be a C composite one, importing the whole concept of necessary relationship between plaintiff and defendant described by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580. In their Lordships' opinion the second view is the correct one. As Lord Wilberforce himself observed in *McLoughlin v O'Brian* [1983] 1 AC 410, 420, it is clear that foreseeability does not of itself, and automatically, lead to a duty of care. There are many other D statements to the same effect. The truth is that the trilogy of cases referred to by Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728, 751, each demonstrate particular sets of circumstances, differing in character, which were adjudged to have the effect of bringing into being a relationship apt to give rise to a duty of care. Foreseeability of harm is a necessary ingredient of such a relationship, but it is not the only one. E Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning.

In my judgment, the principle elements of the tort of negligence distilled from *Donoghue v Stevenson* [1932] AC 562, *Hedley Byrne & Co v Heller & Partners Ltd* and *Yuen Kun Yeu & Ors v A-G of Hong Kong* [1988] 1 AC 175 can be itemized as follows: F

(a) a duty of care;

(b) a breach of that duty;

(c) an injury flowing from that breach; and G

(d) causal link between the breach and the injury.

Now, what was the evidence adduced by the plaintiff to show the negligence of both the defendants. It was pleaded in the amended statement of claim that the motor-lorry trailer was involved in the accident. Yet, under cross-examination the plaintiff faltered and asserted that he could not remember H the registration number of the motor-lorry trailer. The transcript reads as follows:

Soalan: Kamu kata lori treler itu sebenarnya ialah JBP 4502?

Jawapan: Sebenarnya ialah JBR, bukan JBP. Yang saya ingat, bermula dengan JBR. Nombornya saya tak ingat. I

Indeed if it was a motor-lorry with JBR number plate, then the motor-lorry trailer in question — the one itemized by the plaintiff in the amended statement of claim was not involved at all in the accident and, consequently,

there was nothing to link the accident to the first defendant or even to the second defendant.

The plaintiff's account of the accident too was most unsatisfactory. There were blatant and material contradictions which clearly put the plaintiff's case in jeopardy. For instance, in para 2 of the amended statement of claim it was alleged that:

> Plaintif telah mengalami kecederaan apabila sebuah jentera telah jatuh dari motor lori yang tersebut tadi ke atas kaki plaintif.

In sharp contrast was the plaintiff's testimony under oath when he said that the motor-lorry trailer was laden with 40-feet long iron pipes of 30 inch diameter and that the injury sustained by him was as a result of the iron pipes falling on him. Under cross-examination, the plaintiff stated that 'selain daripada paip-paip tidak ada apa-apa barang lagi.' Surely an iron pipe cannot be equated to a 'sebuah jentera (machine).'

Again in his police report (bundle 'IDP' at p 7), the plaintiff stated that one Kumar asked him to open the 'pintu depan' of the motor-lorry trailer. Under examination-in-chief, the plaintiff proceeded to explain in some detail that the motorlorry trailer had several doors. This was how he put it: 'Tiga pintu di kanan, tiga pintu di kiri, satu lagi di depan dan belakang treler.' Under cross-examination, the plaintiff sought to explain that the 'pintu depan' was located behind the prime mover portion of the motor-lorry trailer. An interesting exchange took place in the course of cross-examination. The transcript reads:

> Soalan: Apa yang awak buka bukan pintu depan?
>
> Jawapan: Saya buka pintu pertama di bahagian kanan.
>
> Soalan: Masa awak buka pintu, adakah kepala lori disambung dengan treler?
>
> Jawapan: Ya.

It is amazing that the plaintiff chose to testify that Kumar requested him to open the 'pintu pertama di bahagian kanan treler itu' when it runs counter to his own police report where he categorically said that he was asked to open the 'pintu depan'. If these are not material contradictions, I do not know what is.

Another example of the varying degree of the testimony of the plaintiff can also be seen when, under cross-examination, the plaintiff testified:

> Masa budak (referring to Kumar) suruh saya bantunya, dia berdiri di sebelah bahagian driver. Semasa dia bercakap dia berdiri di sebelah bahagian driver di luar lori. Lepas itu dia pergi ke depan lori dan memeriksa bahagian enjin.

As opposed to this, in his police report the plaintiff was reported to have said that the:

> Kelindan lori nama Kumar menaiki lori No: JBP 4502 telah menyuruh saya ...

These are but samples of the material discrepancies that are apparent from the evidence of the plaintiff. On the value of a police report, I said in *Mohd*

Tajuddin bin Salleh v Mokhari bin A/L Murgis & Anor [1993] 3 CLJ 42 to this effect (at p 45): A

> If the appellant's version is to be accepted it should be reflected in his police report. Such failure would be fatal to the appellant's case. The courts have consistently been emphasising on the need to mention relevant facts in one's police report (see *Wong Ah Sing v Government of Singapore & Ors* [1968] 1 MLJ 1; *Haron v Macaulay* [1969] 1 MLJ 169 (FC); *Nicholas Arthur Nock v Mohamed Ali bin Suleiman & Anor* [1976] 1 MLJ 252 (CA); *Abdul Mokhti bin Hj Ahmad v Idris bin Ibrahim* [1977] 2 MLJ 85 and *Wan Norsiah bte Wan Abdullah v Che Haron bin Che Daud* [1980]1 MLJ 237). I cannot therefore accept the appellant's proposition in the light of all the surrounding circumstances. B C

Reference may also be made to the case of *Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor* [1993] 4 CLJ 291 in regard to the value of the police report.

It was argued that the plaintiff took upon himself the risk of being injured. An examination of the evidence would reveal that the plaintiff was conscious and fully aware of the risk of injury to which he was exposed and he willingly accepted that risk. For instance, under cross-examination the plaintiff did say: D

> Ya, saya sangka kemalangan akan berlaku. Saya sangka paip-paip itu akan jatuh. E

Another interesting piece of evidence would be this:

> Soalan: Adakah dalam fikiran awak, semasa menggunakan tukul, untuk sedia lari?
>
> Jawapan: Ya, pada masa itu ada dalam fikiran saya kemalangan akan berlaku dan saya dapat larikan diri. F

I venture to point out the following significant points which I have painstakingly considered:

(1) That the iron pipes in the motor-lorry trailer were not meant for unloading

There was evidence that if the motor-lorry trailer was laden with iron pipes in the manner as described by the plaintiff, then those iron pipes were either on transit or on the way for delivery to a certain destination. A crane was said to be required to remove those iron pipes. The plaintiff said that a forklift was the likely machine to move those iron pipes. Notwithstanding this difference, it is clearly evident that the plaintiff was fully aware that the iron pipes were not to be unloaded by merely opening the side doors or barriers of the trailer portion of the lorry. Given this knowledge, it is my judgment and I so hold that the plaintiff's action of opening the side door or barrier was a foolish and costly act. It was plain foolhardy on his part. G H

(2) That on opening the 'pintu kanan', the iron pipes would automatically fall. I

It is perhaps interesting to point out that in answer to the question by the court whether on opening the side door or barrier (to the plaintiff it was 'pintu kanan'), there was any obstacle preventing the iron pipes from falling to the ground, the plaintiff replied in the negative. Flowing from

this, it is my judgment that the plaintiff cannot now be heard to say that he didn't expect the iron pipes to fall. The plaintiff testified that he believed the iron pipes were to be removed from the motor-lorry trailer and this can clearly be seen from the following exchange in court:

Soalan: Bila budak suruh awak buka pintu, adakah awak tanya kenapa?

Jawapan: Ya, dia kata nak pindah paip. Saya terima jawapan, tak tanya lagi.

(3) That the plaintiff should have taken the precautionary measure to stand at a safe distance.

The plaintiff testified that he was standing right smack in front of the pin which he was trying to dislodge. The evidence was to this effect as recorded by the court:

Soalan: Awak di kiri pin?

Jawapan: Saya berdiri betul-betul di hadapan pin.

It was again foolhardy on the part of the plaintiff and it can safely be said that he took unto himself the risk of being injured and in fact he was injured by the falling iron-pipes.

(4) That the plaintiff had acted voluntarily.

The plaintiff was not obliged to assist Kumar even if the latter had asked him for help. This was agreed by the plaintiff as can be seen from the following brief recital:

Soalan: Seandainya diminta, awak tidak berwajib tolong?

Jawapan: Ya, saya tidak berwajib tolong.

Indeed this was a damning piece of evidence, it shows that the plaintiff had volunteered and accepted the risk of injury to himself.

It is pertinent to point out that in para 3 of the amended statement of claim it was specifically pleaded that the injury was caused as a result of the machine falling when the 'engsel yang menguncikan pintu tersebut telah pecah.' On this point, there was not a shred of evidence to show that the 'engsel' or pin broke; rather the evidence was that the plaintiff's own action which caused the 'engsel' or pin to be dislodged. In short, the plaintiff was the author of his own misfortune. In my judgment, the evidence cannot support the plaintiff at all and his claim should be dismissed with costs.

Incidentally, the first defendant pleaded that the maxim *volenti non fit injuria* applied. Two things must be put to the fore. Firstly, the courts will be slow to find the existence of an implied agreement unless the person who alleged to have made it had full knowledge of the nature and extent of the risk: *Osborne v The London and North Western Railway Co* (1888) 21 QBD 220. Secondly, although the plaintiff had full knowledge of the nature and extent of the risk and, with that knowledge, in fact incurred it, he will not be prevented from recovering unless the circumstances are such as to show that in incurring the risk he did it on the terms that the loss should fall on him and not on some other person. This is solely because the maxim is *volenti non fit injuria* and not *scienti non fit injuria*: *Yarmouth v France* (1887) 19 QBD 647, per Lord Esher MR; *Thomas v Quartermaine* (1887) 18 QBD 685, per Bowen LJ.

In *Letang v Ottawa Electric Railway Co* [1926] AC 725 at p 731, the Privy Council held that: A

> The law of Canada and English seems to be summed up in the leading proposition to Wills J's judgment (*Osborne v The London and North Western Railway Co* (1888) 21 QBD 220, 223, 224): 'If the defendants desire to succeed on the ground that the maxim volenti non fit injuria is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it'. B

In *Bennett v Tugwell (an infant)* [1971] 2 All ER 248, Ackner J at p 253 said: C

> ... The defendant must prove on the balance of probabilities that the plaintiff did assent to being carried at his own risk and to exempt the defendant from liability for the negligence which caused this accident.

Applying the principles of law expounded in these cases, it is my judgment and I so hold that on the evidence available before this court, the first defendant succeeded in showing that the plaintiff fully understood and appreciated the risk and danger of pulling out the pin and that the plaintiff had acted as a volunteer in the strict sense of the law. D

On contributory negligence as pleaded by both the defendants, it is abundantly clear from the evidence that the plaintiff did not take sufficient care for his own personal safety. He was solely negligent and was responsible for his own mishap. If at all there was contributory negligence, I venture to say that there was ample evidence against the plaintiff. For brevity, I shall itemize the plaintiff's contributory negligence in this way: E

(1) Failure to stand at a safe distance when trying to remove the pin — instead the plaintiff stood squarely in front of the pin when he was engaged in a dangerous activity. F

(2) Failure to consider that there would be no barrier or adequate barrier to the iron pipes once the 'pintu kanan' was opened.

(3) Failure to properly assess the risk before proceeding to remove the pin — the plaintiff knew that the iron pipes were heavy and a source of danger. G

It is my judgment that the plaintiff owed a duty of care to himself for his own safety. The plaintiff's evidence not only showed that he was solely negligent for his own misfortune, it too showed the contributory negligence on his part. Bucknill LJ in *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 succinctly said at p 308: H

> ... when one is considering the question of contributory negligence, it is not necessary to show that the negligence constituted a breach of duty to the defendant. It is sufficient to show lack of reasonable care by the plaintiff for his own safety. That is set out clearly in the speech of Lord Atkin in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, 164 as follows: I
>
> > 'But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or

A the property that is used by the ordinary reasonable man in those circumstances.'

Lord Porter in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at p 186 stated that the term contributory negligence is an expression extolling the meaning to 'negligence materially contributing to the injury'. B Whereas Parke B in *Bridge v Grand Junction Railway* (1838) 3 M & W 244 and Lord Maugham in *R v Southern Canada Power Co* [1937] 3 All ER 923, 930 were of the views that the word 'contributory' must be regarded 'as expressing something which is a direct cause of the accident'. These definitions by these judges must not be used as yardsticks to define the meaning of the words 'contributory negligence' for those words cannot be C used as was done by these judges by reference to its usual or ordinary meaning. There is a legal meaning behind the words 'contributory negligence.' It means a breach of a legal duty to take care. It means the failure by a person to use reasonable care for the safety of himself or his property so that he contributed to the negligence. It is not a breach of a D duty of care owed by the plaintiff to others (*De Cotta v Tan Hock Lee* [1972] 2 MLJ 173) but rather it is the failure of the plaintiff to take reasonable care of himself for his own interest (*Nance v British Columbia Electric Railway* [1951] AC 601).

On the maxim res ipsa loquitur the plaintiff seems to say that the E mere happening of the accident as narrated by him speaks for itself. He holds onto the notion that his account of how the accident took place was consistent with the negligence on the part of the defendants than with any other causes and he asks this court to find both the defendants negligent unless they can give reasonable explanations as to how the accident may have occurred without negligence on their part. According to Lord Normand F in *Barkway v South Wales Transport Co Ltd* [1950] 1 All ER 392 the maxim res ipsa loquitur is 'no more than a rule of evidence affecting onus. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be G within the knowledge of the defendant.' But before this powerful maxim is triggered off, certain conditions must be fulfilled:

(1) On proof of the happening of an unexplained occurrence.

(2) When the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody H other than the plaintiff.

(3) The circumstances point to the negligence in question being that of the defendant solely rather than that of any other person.

But it must be stressed that the doctrine of res ipsa loquitur does not apply when the cause of the accident is known. It was said that 'the res can only I speak so as to throw the inference of fault upon the defender in some cases where the act of the defender is unexplained' — per Scrutton LJ in *Langham v Governors of Wellingborough School* (1932) 101 LJ KB 513 where his Lordship quoted with approval the speech of Lord Adam in *Milne v Townsend* (1890) 19 R 830. It is my judgment that the maxim res ipsa loquitur cannot apply to the present case because the cause of the

accident is known. It is because of the negligent act of the plaintiff in removing the pin that the iron pipes fell and hit him. In *Bolton v Stone* [1951] AC 850, [1951] 1 TLR 977, [1951] 1 All ER 1078 by way of an example where the accident was known the maxim was said to be inapplicable. Briefly, the facts in that case were that a pedestrian was struck on the head by a cricket ball, driven out of the field by a batsman in the course of a cricket match and the court there held that the maxim had no application because all the facts of the occurrence were known and the court there had solely to decide whether on those facts negligence would be pinned on the defendant or not.

A passage that appears in *Clerk and Lindsell on Torts* (12th Ed) in para 796 deserves citation and it is as follows:

> The expression res ipsa loquitur does not state any principle of law. 'This convenient and succinct formula', said Morris LJ, 'possesses no magic qualities: nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin.' (*Ros v Moh* [1954] 2 QB 66, 87). It is only a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it, makes it more probable than not that it was caused by the negligence of the defendant, the doctrine res ipsa loquitur is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebut that probability. The doctrine applies: (1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; (2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition; (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to res ipsa loquitur is inappropriate, for the question of the defendant's negligence must be determined on that evidence.

In my judgment, on the available evidence, the maxim res ipsa loquitur ought not to have been pleaded by the plaintiff at all as the cause of the occurrence was known by the plaintiff himself.

It was argued by the learned counsel for the second defendant that if the plaintiff was an employee of the second defendant, the plaintiff would be precluded from claiming against the second defendant by virtue of ss 31 and 42 of the Employees' Social Security Act 1969. The short answer would be that this point was not pleaded by the second defendant and therefore it should not be considered by this court. In *Red and Yellow Omnibus Co Sdn Bhd & Teoh Soo Yew v Chuah Lay Boon* [1993] 2 CLJ 481 at p 484, I addressed the issue of pleadings in this way:

> Now it has been stated time and again that where the trial court had departed from the strict rules of procedure in deciding a case on an issue not raised in the pleadings the appeal will be allowed (see *Anjalai Ammal & Anor v Abdul Kareem* [1969] MLJ 22 (FC)). The respondent's evidence in court must tally with her averments in the pleadings and should not run

counter to it (see *Lew Voon Kong & Anor v Mustafa bin Kamis* [1978] 2 MLJ 217 (FC) and *Hj Mohd Dom v Sakiman* [1956] MLJ 45). The respondent, in short, must be bound by her pleadings (see *Miskinah bte Jaya & Ors v Mohamed bin Salleh & Anor* [1984] 1 MLJ 187). In the Federal Court case of *Siti Aishah bte Ibrahim v Goh Cheng Hwai* [1982] 2 CLJ 544 his Lordship Abdul Hamid FJ (as he then was) referred to the case of *Menah bt Sulong @ Minah bte Sulong @ Aminah bte Sulong* [1983] 1 CLJ 26 (FC) as authority for the proposition that a decision should be in strict accordance with the pleadings. Lord Normand in *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218 (HL) had this to say:

> 'The function of the pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them (see p 238).
>
> I wish to associate myself with the observations of my noble and learned friend, Lord Radcliffe, on the value of pleadings. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded (see p 239).'

For the reasons adumbrated above, the claims by the plaintiff against both the defendants were dismissed with costs.

Quantum

Notwithstanding the dismissal of the plaintiff's claims, I proceed to assess damages. The plaintiff claimed general damages for:

(a) pain and suffering;
(b) costs of prosthesis, maintenance and future renewals;
(c) loss of earnings; and
(d) special damages.

General damages

(a) *Pain and suffering*

The plaintiff must have suffered. He sustained crush injury. The medical report from the Sultanah Aminah Hospital itemized the injuries sustained by the plaintiff as: 'left leg with compound communited fracture of tibia and fibula, cut muscle, tendons, nerves and vessels resulting in traumatic amputation of left leg.' The standard award for amputation of a leg seems to be in the region of RM50,000 and I so ordered accordingly. For comparables, references were made to the following cases. In *Ng Kat Seng v Selvaraju* (1990) MMD Aug 821 for amputation of left leg below the knee, Abdul Malek Ahmad J (now JCA) awarded RM50,000. In *Shlvanathan v Chang Chong Foo & Anor* (1991) MMD Aug 874, Abu Mansor J (now JCA) awarded RM50,000 for loss of leg up to above the knee. Lim Beng Choon J in *Tea Hock Chong v Razali bin Hanafiah* (1990) MMD June 1990 awarded RM50,000 for amputation of the right ankle followed by an above-knee amputation of the right leg. Finally, *Veeriah a/l Punnusamy v Lee Yap t/a Sem Leong Timber Trading Co* [1989] 1 CLJ 73 for amputation of the leg, LC Vohrah J awarded RM50,000.

(b) *Prosthesis*

There was evidence that the plaintiff fitted himself with an artificial limb some five months before the commencement of the hearing at a cost of RM2,000 to enable him to ambulate with greater ease and management. It is a well-known fact that artificial limbs have a limited life span and there is a need to replace it periodically. There is also a need to service and maintain the artificial limb from time to time. The courts have been generous. Claims for artificial limbs, future renewals of artificial limbs as well as for service, maintenance and replacement of spare parts have been allowed by the courts. In some instances, the courts have been magnanimous by awarding travelling expenses which may be incurred in future for servicing artificial limbs. Thus, in *Azman bin Kasri & Anor v Md Isa bin Endut & Govt of Malaysia* [1988] 2 CLJ 743 his Lordship Eusoff Chin J (now the Chief Justice of the Federal Court) awarded RM33,600 for cost of fitting artificial limb and for the future, RM20,640 for cost of future renewal of consumptive items and RM10,500 for travelling expenses for servicing of artificial limb (three trips per year at RM100 per trip for 35 years). Abu Mansor J (now JCA) in *Shlvanathan v Chang Chong Foo & Anor* (1991) MMD Aug 874 awarded:

(a) RM26,500 for cost of five renewals of artificial limb;

(b) RM20,960 for cost of renewals of consumptive items for servicing the artificial limb;

(c) RM16,000 for travelling expenses incurred in fitting the artificial limb; and

(d) RM3,300 for cost of artificial limb and fitting under special damages.

In *Ng Kat Seng v Selvaraju* (supra), Abdul Malek Ahmad J (now JCA) awarded RM19,000 for maintenance costs of artificial limb. In *Wong Yee Cheong & Anor v Toh Seng Chuan* [1988] 2 CLJ 624, Eusoff Chin J (now the Chief Justice of the Federal Court) awarded RM79,960 for cost of artificial limb, renewals of replacement parts.

Three quotations for prosthesis have been obtained and marked accordingly. They can be stated thus:

(a) Muhammad Limb & Aid Co gave a quotation for RM99,298.95.

(b) Lee Prosthesis & Orthotic Centre Sdn Bhd listed the price at RM36,170.

(c) Teh Lin Prosthetic & Orthopaedic Co Sdn Bhd cited a figure of RM16,520.

Muhammad Limb & Aid Co's quotation is quite expensive as it is of good quality, modular below the knee prosthesis and took into account an increase of 20% on pricing every five years; it shows the pricing of certain parts of the artificial limb that need replacement as these parts have varying life spans. Lee Prosthesis Orthotic Centre Sdn Bhd's quotation is in regard to an advanced lightweight carbon fibre prosthesis whereas Teh Lin Prosthetic & Orthopaedic Co Sdn Bhd's quotation is on the lower scale and it does not mention the type of prosthesis but presumably it would be a very basic model as the cost is very low. I reject the quotation

by Teh Lin Prosthetic & Orthopaedic Co Sdn Bhd as the plaintiff deserves a better prosthesis than what has been recommended by the company. That leaves only the two quotations left and as there is no evidence why one should not be preferred as against the other, I am entitled to make a choice and make my preference known. It was argued by learned counsel for the first defendant that the plaintiff should not be permitted to claim the amount stated in Lee Prosthetic & Orthotic Centre Sdn Bhd as it was related to the most advanced lightweight carbon-fibre prosthesis and that the plaintiff was not entitled to the best prosthesis and was under a duty to mitigate damages. This argument is wholly untenable and I reject it accordingly. The plaintiff is entitled to the best as the purpose of compensation is to put the plaintiff as the victim, so far as money can do the trick, in as near a position as he was before the tort was committed. No one likes to have his leg amputated. A one-legged man should, nevertheless, be showered with sympathy. An advanced prosthesis as recommended by Lee Prosthetic & Orthotic Centre Sdn Bhd, being the most advanced prosthetic in the market, would certainly help the plaintiff to lead a more normal life and he certainly ought to be given a chance to use it. For these reasons, I awarded RM36,170 under this head.

Loss of earnings

The plaintiff claimed for loss of earnings at the rate of RM800 per month from the date of the accident. The plaintiff testified that prior to the accident he was employed by the second defendant as a driver cum attendant and was paid approximately RM900 per month. After the accident, the plaintiff lost his capacity to work and to date he was still unemployed. No documentary evidence of employment was advanced to show that the plaintiff was employed by the second defendant prior to the accident and notwithstanding this, it was urged upon me to accept the plaintiff's testimony as to his employment as the gospel truth. It was argued that a claim for loss of earnings should not be defeated merely on account of lack of documentary evidence. Abdul Malek Ahmad J (now JCA) was magnanimous enough to give a figure of RM700 per month as the average earning of a marble grinding contract worker when his Lordship said in *Balakrishnan s/o Kunjamboo Nair v Savastine Anthony s/o Francis* [1991] 1 CLJ 503 especially at p 506:

> My view was that in the absence of any documentary evidence, I could take judicial notice of the average earnings of marble grinding contract workers to be in the region of about RM700 per month and made this award for two years totalling RM16,800 up to August 1983.

I am prepared to itemize the plaintiff's salary at RM800 per month and gave a deduction of RM230 being the admitted living expenses of the plaintiff, leaving a balance of RM570 only. The plaintiff was aged 41 at the time of the accident. The multiplier would be calculated on the basis of 55 years minus 41 years and divided by 2 would give a figure of 7 years or 84 months. This would again be divided into pre-trial and post-trial. The accident took place on 24 November 1989 and up to 27 February 1996

(expected date of judgment) there would be 76 months as pre-trial loss, leaving a balance of 8 months as the post-trial loss. Thus, the award under this category would be as follows:

(a) *Pre-trial*

RM570 x 76 months = RM43,320

(b) *Post-trial*

RM570 x 8 months = RM 4,560

Special damages

(1)	Damage to clothing	...	abandoned
(2)	Crutches	...	abandoned
(3)	Transport expenses for members of family to visit the plaintiff at the hospital (Evidence was 2 or 3 trips at RM4 per trip for bus fare)	...	RM12
(4)	Transport expenses for outpatient treatment (Evidence was 6 trips at RM10 per trip)	...	RM60
(5)	Medical expenses at Klinik Raya	...	abandoned
(6)	Cost of police report	...	RM2
(7)	Cost of medical report	...	RM40
(8)	Cost of company search	...	RM10
(9)	Artificial limb	...	RM2,000

Interest was awarded for general damages at the rate of 8% pa from the date of service of the writ to the date of judgment (27 February 1996).

For special damages, an interest at the rate of 4% pa from the date of accident to the date of judgment (27 February 1996) was also awarded. No interest should accrue for post-trial loss of earnings.

Finally, interest on the judgment sum at 8%pa from the date of judgment (27 February 1996) to the date of satisfaction was ordered by this court.

Claims dismissed.

Reported by Khoo Chuan Swee